

Committee on Resources Subcommittee on Water & Power

Witness Statement

**PREPARED STATEMENT
of
MICHAEL J. BROPHY
for
DEL WEBB CORPORATION**

**IN REGARD TO THE PROPOSED TECHNICAL
AMENDMENT TO THE AK-CHIN
WATER USE ACT OF 1984**

H. R. 2647

**SUBMITTED TO THE SUBCOMMITTEE
on
WATER AND POWER
COMMITTEE ON RESOURCES**

**FEBRUARY 10, 2000
WASHINGTON, D.C.**

Mr. Chairman and Members of the Committee:

My name is Michael Brophy. I am an attorney and a member of the Phoenix, Arizona, law firm of Ryley, Carlock & Applewhite. Our firm serves as water counsel to Del Web Corporation (“Del Webb”), on whose behalf I am appearing here today. Del Webb is a developer of master-planned active adult and family communities throughout the United States.

My testimony today is directed in support of H. R. 2647, which, if approved, will grant the Ak-Chin Indian Community of Central Arizona (referred to herein sometimes as “the Community”) more flexible authority to lease for off-reservation use water supplies from the Central Arizona Project (“CAP”) made available to the Community from a congressionally-approved settlement of the Community’s water rights claims.

By way of background, the Ak-Chin Indian Community has a reservation occupying 21,840 acres approximately 30 miles south of Phoenix, Arizona. The Community is organized under the Indian Reorganization Act of 1934 and has approximately 800 enrolled members.

In 1978, Congress enacted Public Law 95-828 to settle the water rights claims of the Community. The Community’s settlement is historic in the sense that it was the first Indian water rights settlement in Arizona to be approved by Congress. However, difficulties in implementing the 1978 legislation led to further legislation in 1984, when Congress enacted Public Law 98-530. The 1984 law confirmed to the Community rights to the delivery of 75,000 acre-feet per annum of water from the CAP during times of normal supply

on the Colorado River. The law also confirmed the Community's entitlement to the delivery of up to 85,000 acre-feet per annum of water from the CAP during times of surplus and guaranteed the delivery of 72,000 acre-feet per annum during times of shortage. The 1984 enactment did not contain authorization for the Community to lease any of its water for use off of the Community's reservation.

In 1992, following the 1988 enactment of the Salt River Pima-Maricopa Indian Water Rights Settlement Act of 1988, Public Law 100-512, and the 1990 enactment of the Fort McDowell Indian Community Water Rights Settlement Act, Title IV of Public Law 101-628, the Community requested Congress to grant authority for the Community to lease portions of its settlement water for off-reservation use. Congress responded by enacting Section 10 of Public Law 102-497 in 1992.

Section 10, known as the "Ak-Chin Water Use Amendments of 1992," authorized the Community to use its water for agricultural, municipal, industrial, commercial, mining, recreational or other beneficial uses within Central Arizona, and, specifically, within the Phoenix, Pinal, and Tucson Active Management Areas. By way of explanation, Active Management Areas are areas in Arizona in which groundwater usage is strictly regulated by the Arizona Department of Water Resources, the state agency charged with regulating Arizona's water resources. The 1992 amendments also authorized the Community to lease its water supplies for the same purposes within the same area. Specifically, the Community was authorized to "lease or enter into an option to lease, extend leases, exchange or temporarily dispose of water." The term of any lease cannot exceed 100 years, and the Community may not permanently alienate its water rights.

In 1994, Del Webb and the Community entered into an option and lease agreement under which the Community granted Del Webb an option to lease up to 10,000 acre-feet of the Community's water supplies for a period of 100 years from the date the option was exercised. Del Webb exercised the option in December 1996 and leased 10,000 acre-feet of the Community's water for a 100 year period ending in December 2096. The water was intended to be used, and in fact is being used, to support the development of Anthem Phoenix, a master-planned community north of Phoenix, Arizona.

Within the Active Management Areas of central Arizona, land may not be subdivided unless it has an assured water supply. The term "assured water supply" is defined in Arizona Revised Statutes §45-576.1 to mean that "sufficient . . . surface water . . . of adequate quality will be continuously available to satisfy the water needs of the proposed use for a least one hundred years." Under the assured water supply program, subdivisions within Active Management Areas must show the continuous physical and legal availability of the water supply to be used for the subdivision for 100 years. The assured water supply requirement is believed by everyone in the Arizona to be beneficial because it insures a 100-year water supply for subdivisions from the date they are approved. In an arid area such as Arizona, where water supplies are increasingly precious, the assurance of 100 years of water availability is regarded as fundamental to sound management of water resources for the protection of the public.

The existing leasing authority which Congress has granted to the Community does not provide sufficient flexibility to the Community to enable its water supplies to be used for purposes of demonstrating an "assured water supply," at least without imposing a significant burden on the lessee. The reason is as follows: Large master planned communities are typically built out over a period of many years. In the case of Del Webb's Anthem Phoenix, build-out may occur over a twenty or thirty year period. During a master planned community's build-out period, the developer is required to show that water will be available for 100 years for each phase of the development as development occurs. If the first phase of a development is approved in the first year of an Indian water lease, water under the lease is considered to be available for 100 years for purposes of the assured water supply program. However, if approval of a second phase of a development is sought in the fifth year of a 100 year lease, water is not considered to be available for 100 years because only 95 years remain in the lease. Consequently, the existing leasing authority which Congress has granted the Community does not provide enough flexibility for its water supplies to be leased for off-reservation use in municipal development, at least without expensive back-up arrangements such as

recharge and purchase of other water rights. These back-up arrangements increase the costs of water supply arrangements to lessees and have the effect of decreasing the value of water which Indian Communities such as the Ak-Chin Indian Community choose to lease.

The proposed amendment would give the Community the authority to structure leasing arrangements with lessees to make water available under the lease as and when the lessee must demonstrate 100-year water availability in the successive phases of a development. The amendment would make it possible for the Community to enter into and renew option agreements to lease its water, or to grant leases which may be renewed for a period equal to their initial 100-year term. The amendment provides for no more than one 100 year extension, and it also continues the prohibition on the Community's alienation of its water rights. Nevertheless, the amendment will provide the Community with the requisite authority to enter into sophisticated transactions with cities, developers and other water users in Central Arizona, and will allow the Community to maximize potential returns through leasing those portions of its water resources which it chooses not to use on its reservation.

Consistent with Congress' practice of approving leases that are entered into in connection with Indian water rights settlements¹, the amendment will also approve the existing lease between Del Webb and the Community and an amendment of the existing lease to allow the lease to be extended, with respect to 7,200 acre-feet of water, for up to an additional 21 years from December, 2096, when the original lease would otherwise expire.

As more CAP water becomes available to Arizona Indian Communities pursuant to water rights settlements, and as and when the Indian Communities choose to lease this water for use off their reservations, these Communities will need Congressional authorization to enter into leasing arrangements which will allow them to maximize the value of their water resources, while providing their lessees with leases structured so as to make the leased water available for 100 years under Arizona's assured water supply program. The proposed amendment solves this issue for the Ak-Chin Indian Community and provides a template for use in future Arizona Indian water rights settlements.

I thank you for the opportunity to testify here today. I would be pleased to answer any questions you may have.

¹See Section 8(b), Public Law 100-512, 102 Stat. 2554, October 20, 1988, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988 (approving leases); Section 407(b), Public Law 101-628, 104 Stat. 4487, November 28, 1990, Fort McDowell Indian Community Water Rights Settlement Act of 1990 (approving leases). See also Section 3706 (c), Public Law 106 Stat. 4746, October 30, 1992, San Carlos Apache Tribe Water Rights Settlement Act of 1992 (approving amendments to Tribal CAP delivery contract).

#